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BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the matter of	)	
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COMPUTER	)	
RESERVATION SYSTEMS (CRS)	)	**DOCKET OST-97-2881 – 132**
REGULATIONS	)	**DOCKET OST-97-3014 – 5**
	)	**DOCKET OST-98-4775 – 50**
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COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

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COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

On July 21, 2000 the Department of Transportation ("Department") issued a "Supplemental Advance Notice of Proposed Rulemaking" inviting comments on the Department's Computer Reservation System Regulations (14 C.F.R., Part 255). The Air Carrier Association of America ("ACAA") submits these comments and hereby requests the Department to immediately suspend Section 255.10(a), "Marketing and Booking Information," or in the alternative, amend that provision as proposed later in this document.

The Status of Competition

As the Department has acknowledged, concentration and consolidation in the nation's airline system continues. The nation's six largest carriers control approximately 84 percent of overall domestic market share. New entrants control less than 2 percent of that market share. At the same time that we have record levels of concentration, we are witnessing proposals that could lead to five, four or even three primary carriers. At some major hub airports, the dominant carrier controls 80 to 90 percent of the airport's passengers. With those levels of concentration, new entry is difficult at best.

New entry is the backbone of the Airline Deregulation Act. In order for deregulation to work, it is essential that the Department adhere to the principles behind deregulation which call for "the encouragement of entry into air transportation markets by new air carriers, the encouragement of entry into additional air transportation markets by existing air carriers, and the continued strengthening of small air carriers so as to assure a more effective, competitive airlines industry." (The Airline Deregulation Act of 1978. P.L. 95-504, 902 Stat. 1705, Sec. 102(a)(10)).

At a Transportation Research Board hearing on airline competition held by the Committee for a Study of Competition in the U.S. Airline Industry (as required by H.R. 4328, The Omnibus Appropriations Bill of 1999), Department officials acknowledged that new entry is key to industry competitiveness. The document they presented explained that, "in spite of deregulation's success," a number of competitive concerns exist. They added that "barriers to entry, particularly at dominated hubs, inhibit the successful introduction of new competition."

New entry is becoming more and more difficult. In some cases, smaller carriers have announced that they will avoid competing at major hubs.

> Midway is reluctant to compete with any large carrier. It is my belief that in order to start—and perhaps more important, to survive—in this industry, an airline must: One, build a business plan that is not premised upon cream skimming the routes of the major carriers. We have consciously avoided picking fights with major airlines by flying directly into their hubs. This strategy has avoided the bruising battles that your Committee has heard about repeatedly from new airlines, which some call predation. — Robert Ferguson, Midway Airlines Chairman, May 2, 2000

This is not a good development for the traveling public and communities. Certainly, this diminished level of competition is not what was intended by the Airline Deregulation Act.

All of those who have studied the status of airline competition have acknowledged that there are several different causes for the reduction in competition, however, all parties acknowledge that in many cases new entrants have been driven out of markets by behavior directed at them by incumbent carriers. An incumbent carrier that controls 80 to 90 percent of a hub airport and an entire area of the country has various anti-competitive tools available to it.

Computer Reservation System: Barrier to Entry

For the past decade, Department and GAO studies have identified Computer Reservation System ("CRS") abuses as one of the factors that inhibits competition and new entry. In testimony before the House Aviation Subcommittee Hearing (October 21, 1999), former Department General Counsel Nancy McFadden stated:

> A number of factors still prevent airline passengers and the airline industry itself from enjoying the full benefits of deregulation. These have been documented in a number of studies, including the TRB's. In particular, barriers to entry within the industry include computer-reservations

> systems, frequent flyer programs, travel agent commission overrides, exclusionary behavior . . . "

At that hearing, the Department released its response to the TRB report, which stated:

> In our CRS rulemaking, we will investigate whether additional rules are needed to prevent airlines that dominate markets from using that dominance to deter travel agencies from booking customers on competitors and from giving travel agency customers complete and impartial advice.

Both the Department and Department of Justice continue to receive complaints that large carriers are taking actions to force new entrant carriers out of markets. By taking such actions, hub carriers are able to drive out new entrants attempting to bring some level of competition to the markets controlled by those large carriers.

Disclosure of CRS Data

To maintain hub domination, large carriers monitor the ticketing activities of travel agencies and major corporations. While large carriers have various methods for monitoring these groups, their primary "anti-competitive tool" is the data available to them pursuant to the Department's regulation — 14 CFR§255.10(a).

Under sec. 255.10(a) each CRS:

> shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to carriers that it elects to generate from its system. The data made available shall be as complete and accurate as the data provided a system owner.

At a time that concentration has reached historic levels, there is no reasonable basis for a government regulation to allow large carriers to purchase data that discloses if one of its

corporate customers has dared to purchase even small numbers of tickets from a new entrant carrier or if a travel agent has dared to sell a seat on a competitor.

In response to the Department's proposal to extend the CRS rules, on March 14, 2000, the American Society of Travel Agents, Inc., ("ASTA") requested that the Department begin an expedited review of 14 CFR §255.10, which directs CRS vendors to sell travel agency-generated transaction data that it generates from its CRS.

On April 12, 2000, American Express submitted comments to the docket that stated:

> Amex concurs with American Society of Travel Agents ("ASTA"), OST-2000-6984-5, that the Department should expedite its review of Section 255.10. This Section, which directs carrier-owned CRS vendors to provide sales and marketing data to all airlines, should be terminated at the earliest possible date. We made this point in our original comments filed in December 1997, OST-97-2881-33, but technology has advanced to such a degree since then that termination of this Section is now critical.
>
> When Section 255.10 was enacted, CRSs could only produce historical data, typically 60-90 days post flight, which the airlines would use for trend analysis and other acceptable purposes. Since then, technology has progressed to the point that today CRSs are producing and making available real time data. An airline can, thus, obtain up to the minute analysis of competitors' sales, market share and customer information, even on a *pre-flight* basis. A carrier, so disposed, is able to use this real time (and advance) data for predatory pricing, blocking new entrants from the marketplace, signaling and other anticompetitive activity. **What began as a tool to promote competition has become a weapon to eliminate it.**
>
> [emphasis added]

In comments filed on April 14, 2000, ACAA joined ASTA in urging the Department to immediately begin a proceeding to bar CRS owners from providing such agency and corporation specific transaction data to the nation's largest air carriers. This is particularly the case since some of these same carriers engage in anti-competitive and predatory practices. To allow carriers that already dominate hub airports and entire

regions of the country and world access to the transaction data of their small competitors, a practice inconceivable in any other industry, is an obvious threat to the survival of competition.

Section 255.10 allows a dominant hub carrier to obtain information about other carrier's transactions including the class of service, price paid, date of purchase and route selected. The data also allows a large carrier to monitor travel agencies and corporations it has agreements with and already dominates. Although all carriers may have the opportunity to purchase the tapes, the purchase of this data by new entrant carriers is cost prohibitive. Moreover, the value of the data to new entrant carriers is limited. Because of the importance of this information in combating a new entrant's attempt to enter a hub, it makes that new entrant even more vulnerable to the onslaught of large carriers' anti-competitive practices. In enabling a large carrier to oversee the details of travel agency and corporate business transactions and to monitor who is utilizing a new entrant's service, the rule provides the large carriers with even more data to eliminate lower fares and, ultimately, competition.

There is little doubt that large carriers are using CRS information to destroy new entry and competition. Predatory behavior permeates throughout this industry. An example of how carriers drive competitors out of markets is the case brought against AMR, American Airlines and American Eagle by the government. In its Complaint, the Department of Justice stated:

> American dominates DFW and charges monopoly fares on many DFW routes. When small airlines try to compete against American on these routes, American typically responds by increasing its capacity and reducing its fares well beyond what makes business sense, except as a means of driving the new entrant out of the market. Once the new entrant is forced out, American promptly raises its fares and usually reduces its

> service. Through its predatory and monopolistic conduct, American deprives consumers of the benefits of competition in violation of the antitrust laws.

The Department has recently announced that it is reviewing anti-competitive complaints brought by Sun Country and AirTran against several of the large carriers. Why would the Department want to allow American (or any large carrier) to oversee travel agency and corporate purchases of tickets by new entrants?

When a carrier controls over 50 percent of the traffic at a major hub, has corporate deals with most major companies in the community that require the company to purchase most if not all the company's travel needs from the dominant hub carrier, there is only one purpose for that carrier to purchase and review tapes that identify what tickets that corporation has purchased or what tickets travel agencies have sold – elimination of all competitive challenges. The carrier knows what it has sold to the corporation. Its only interest is determining whether that corporation has purchased any ticket on a competitor. Therefore, the Department has allowed a regulation to stay in place that allows dominant hub carriers to engage in well-documented anti-competitive missions. It is time to put that to an end.

Need For Immediate Action

For these reasons, the use and possession of CRS transaction data is a matter that requires immediate attention from the Department. During the last several years, the Department has issued multiple proposals addressing CRS issues. This review was initiated in 1997. Over the past year, the issues involved in this review have increased. In this supplemental notice, the Department has asked whether "we should adopt" any rules covering the distribution of airline services through the Internet." While the answer

to that question is yes, the Department should not wait to issue a final rule on §255.10(a) until it has thoroughly reviewed **all** of the CRS issues. It is appropriate and necessary for the Department to immediately address some issues while continuing its review of other issues. Over 125 comments have been submitted in response to the various Department proposals. As noted above, several of the comments submitted to the various Department dockets have addressed the anti-competitive nature of §255.10(a).

ACAA strongly believes that the Department must terminate the rule that allows one carrier to purchase CRS transaction data involving another carrier unless that carrier approves the distribution of its data. The Department needs to put an end to the regulatory provision that enhances "anti-competitive" activity. All parties are aware that this issue needs to be addressed. There have been numerous statements signifying that this provision is under review. No party has submitted a comment defending §255.10(a).

In addition to taking this immediate action, the Department needs to accelerate its review of Internet ticket sale agreements and to address all CRS issues. If the Department is prepared to issue other final rules at this time, it should do so. There is no legitimate purpose for any carrier to possess this type of information involving another carrier. While ACAA would prefer that the Department finalize comprehensive new CRS regulations, for a variety of reasons, the Department has been unable to complete that effort and may not be able to accomplish that objective until next year. In the interim, the Department should not allow this anti-competitive weapon (Section 255.10(a)) to be aimed at new entrants. How many additional examples of new entrants being forced out of hub markets or new entrants admitting that they will not enter a hub market are needed before the Department agrees to take action?

Therefore, ACAA recommends that 14 CFR § 255.10(a) be immediately suspended until the Department issues new CRS regulations or, in the alternative, Section 255.10(a) be amended[1] as follows:

§255.10 Marketing and booking information.

> (a) Each system shall make available to all U.S. participating carriers on nondiscriminatory terms all marketing, booking, and sales data relating to carriers that it elects to generate from its system. The data made available shall be as complete and accurate as the data provided a system owner. **The system shall not provide to any participating carrier data on another carrier unless that other carrier has provided written authorization for the system to release the data.**

The need to level the playing field has never been greater. By taking this small step, the Department will be promoting the future of deregulation, and will be supporting travelers and communities from throughout the country. The Department should not put off for one more day the amendment of Section 255.10(a). Too much is at stake.

Respectfully submitted,

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[1] These changes should be implemented no later than September 30, 2000.